

**AUG 25 2003**Robles v. Duncan, No. 02-15521**CATHY A. CATTERSON****U.S. COURT OF APPEALS**

GRABER, Circuit Judge, concurring in part and dissenting in part:

1. I concur in Parts 1 and 2.

2. I respectfully dissent from Part 3 because the equal protection claim does not "relate back" to the timely filed claim for ineffective assistance of counsel.

Under Rule 15(c)(2), an amendment relates back only if the nonmoving party received "sufficient notice of the facts and claims giving rise to the proposed amendment." Anthony v. Cambra, 236 F.3d 568, 576 (9th Cir. 2000) (emphasis added).

As for notice of the claim, the original petition alleged various claims of ineffective assistance of counsel but did not include an equal protection claim. The petition attached two state filings as exhibits, both of which did refer to an equal protection claim. The natural inference to be drawn is that the petition intentionally omitted that claim.

Additionally, the facts underlying the two claims are not the same. The facts underlying the claims of ineffective assistance of counsel pertain to what the lawyer said and did, or failed to say and do. By contrast, the operative facts underlying the equal protection claim are the statutory provisions that create different requirements for taking guilty pleas. Those facts are found nowhere in

the petition.

For these reasons, I cannot join Part 3.